93-48

NO.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOHN H. CURTIS,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether individual federal employees acting within the course and scope of their employment are subject to criminal prosecution for violation of the Clean Water Act?

II.

Whether the definition of "person" in the Clean Water Act includes employees of the Federal government?

LIST OF ALL PARTIES

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PETITION FOR WRIT OF CERTIORARI

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TO THE SUPREME COURT OF THE UNITED STATES:

John H. Curtis petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

_____

OPINION BELOW

The opinion of the court of appeals (Ap., infra, 1a-8) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App., infra, 9a) was entered on March 8, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

John Hoyt Curtis was Fuel Division Director at Adak Naval Air Station in Alaska during the winter of 1988-89. In that capacity, Curtis managed several civilian employees who were responsible for storing and

pumping various types of fuels used at Adak for generation of steam and electricity.

On September 21, 1991, Curtis was indicted on five counts of knowingly discharging a pollutant (jet fuel) into the surface waters of the United States in violation of sections 301(a) and 309(c)(1) of the Federal Water Pollution Control Act of 1972 (Clean Water Act). codified at 33 U.S.C. §§ 1311(a) and 1319(c)(1).

Specifically, the government charged that on 41 separate occasions between October 1988 and February 1989, Curtis directed his subordinates to pump jet fuel through the pipeline connecting the main storage tanks to the steam and electrical generating plants, knowing at the time that the pumping would cause jet fuel to leak from an abandoned spur line. The government alleged that Curtis' actions ultimately caused the jet fuel to leak into an intermittent stream,

some of which then flowed into Sweeper Creek and the Bering Sea.

Curtis moved to dismiss the indictment, contending, among other arguments, that he was not a "person" subject to the enforcement provisions of the Clean Water Act as defined in Sections 309(c)(6) and 502(5). The district court denied Curtis' motion to dismiss.

After three days of deliberation, the jury found Curtis guilty on one court of knowingly discharging a pollutant and two counts of the lesser included offense of negligent discharge of a pollutant. He was found not guilty on the remaining two counts. The district court sentenced Curtis to ten months imprisonment on each count to be served concurrently.

REASONS FOR REVIEW

1. The Decision Below Conflicts with the decisions of the Supreme Court construing the Clean Water Act.

The Court below interpreted the failure of the Clean Water Act to specifically exempt federal employees acting within the scope of their employment from criminal liability as imposing criminal liability upon those employees. That result by the court of appeals is untenable in view of this Court's holdings in EPA v. State Water Resources Control Board, 426 U.S. 200, 222, n. 37 (1976) determining, "That federal agencies, departments and instrumentalities are not "persons" within the meaning of § 301(a) and the amendments." United States Department of Energy v. Ohio, et al., 112 S. Ct. 1627 (1992) (any waiver of sovereign immunity must be unequivocal). The court of appeals ruling

holding implies that waiver of sovereign immunity may be inferred. (App., infra, 5a-7a).

The definition of "person" found in § 1362(5) of the Clean Water Act has not changed since the opinion in EPA. The court below quotes from a case involving RCRA, 42 U.S. §§ 6901, et seq. U.S. v. Dee, 912 F.2d 741, 744 (4th Cir. 1990), saying that "the term "individual" includes federal employees prosecuted in their individual capacities." RCRA defines "person" to include governmental corporation. CWA does not include "governmental corporations." Neither statute includes the United States in its definition of "person." The failure of the court below to acknowledge the definitions of "person" in the CWA and in the opinions of this Court justify the grant of certiorari to review the judgment below.

2. There has been no waiver of immunity in criminal cases involving federal employees acting within

the course and scope of their employment.

Federal employees acting within the course and scope of their employment are entitled to the protection of immunity from criminal prosecution. There are numerous statutes dealing with the environment. They are all placed under the jurisdiction of EPA. Each of the environmental statutes includes a definition of "person." Some include a definition similar to that found in CWA. The Federal Insecticide, Fungicide and Rodenticide Act, 7 USCA 136. Other statutes extend the term person to include statutes extend the term person to include (government corporations). RCRA 42 USCA 6903. "Person" is defined in the Clean Air Act 42 USCA 7602(e) as including "any agency, department, or instrumentality of the United States and any officer, agent or employee thereof." If Congress had intended for the CWA to apply to the Federal Government or its

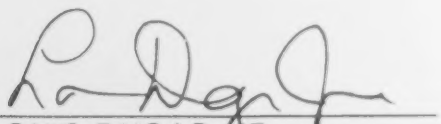
employees, it would say so. The EPA case was decided in 1976. Congress amended the definition section of CWA in 1988, but did not change the definition of "person." Therefore Federal employees are entitled to immunity in criminal cases.

The Court in the DOE case held that there was no waiver of sovereign immunity from liability for civil fines. That reasoning applies to this case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,



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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 92-30235

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN HOYT CURTIS,

Defendant-Appellant

Appeal From The

United States District Court

For The District of Alaska

James K. Singleton,

District Judge, Presiding

Submitted January 8, 1993

Seattle, Washington

Filed March 8, 11993

Before: Jerome Farris and Andrew J. Kleinfeld, Circuit Judges, and David Alan Ezra, District Judges

Opinion by Judge Ezra

OPINION

EZRA, District Judge:

John Hoyt Curtis appeals his conviction for discharging a pollutant into the surface waters of the United States in violation of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311(a), 1319(c)(2)(A). He argues that the CWA does not apply to federal

employees whose alleged violations occurred in the course of their employment. We reject the argument. Since Curtis is a "person" subject to the enforcement provisions of the CWA as defined in 33 U.S.C. §§(c)(6), 1362(5), we affirm.

1. Facts

John Hoyt Curtis was Fuels Division Director at Adak Naval Air Station in Alaska during the winter of 1988-89. In that capacity, Curtis managed several civilian employees who were responsible for storing and pumping various types of fuels used at Adak for generation of steam and electricity.

On September 21, 1991, Curtis was indicted on five counts of knowingly discharging a pollutant (jet fuel) into the surface waters of the United States in violation of sections 301(a) and 309(c)(1) of the Federal Water Pollution Control Act of 1972 (Clean Water Act), codified at 33 U.S.C. §§1311(a) and 1319(c)(1).

Specifically, the government charged that on 41 separate occasions between October 1988 and February 1989, Curtis directed his subordinates to pump jet fuel through the pipeline connecting the main storage tanks to the steam and electrical generating plants, knowing at the time that the pumping would cause jet fuel to leak from an abandoned spur line. The government alleged that Curtis' actions ultimately caused the jet fuel to leak into an intermittent stream, some of which then flowed into Sweeper Creek and the Bering Sea.

Curtis moved to dismiss the indictment, contending, among other arguments, that he was not a "person" subject to the enforcement provisions of the Clean Water Act as defined in sections 309(c)(6) and 502(5). The district court denied Curtis' motion to dismiss.

After three days of deliberation, the jury found Curtis guilty on one count of knowingly discharging a

pollutant and two counts of the lesser included offense of negligent discharge of a pollutant. He was found not guilty on the remaining two counts. The district court sentenced Curtis to ten months imprisonment on each count to be served concurrently.

Curtis contends that the district court erred in not dismissing the indictment. He contends that the Clean Water Act does not apply to federal employees whose alleged violations occurred in the course of their employment.

II. Standard of Review

A district court's decision to deny a motion to dismiss an indictment based on its interpretation of a federal statute is reviewed de nova. ***United States v. Dahms,*** *938 F.2d 131, 133 (9th Cir. 1991);* ***United States v. Marinez,*** *806 F.2d 945 (9th Cir. 1986), cert. denied, 481 U.S. 1056 (1987).*

III. Analysis

33 U.S.C. § 1319(c)(2) provides in part:

Any person who knowingly violates sections 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title .... (emphasis added.)

The Clean Water Act defines person as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5).

Curtis contends that the Clean Water Act must be read in para materia with other environmental statues, several of which explicitly include federal employees as individuals. The failure to specifically include federal employees within the definitions of the CWA, Curtis suggests, was a deliberate decision made with knowledge of the inclusion of federal employees in the other statutes. When the CWA is read in comparison with these other statutes, Curtis argues, it demonstrates Congress' intent not to subject federal employees acting

within the scope of their employment to criminal prosection.

Normally, if the language of a statute is unambiguous, its plain meaning controls. In re Perroton, 958 F.2d 889, 893 (9th Cir. 1992) ("If the language of the statute is clear and unambiguous, judicial inquiry is complete and that language controls absent rare and exceptional circumstances."); Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy, 898 F.2d 1410, 1417 (9th Cir. 1990); U.S. v. Brittain, 931 F.2d 1413,1419, (10th Cir. 1991), cert. denied, 111 S. Ct. 1307 (1991) (holding that the unambiguous language of §§1319(c) and 1362(5) defines "individual" broadly to include city employees who willfully or negligently caused a violation of an NPDES permit).

The Fourth Circuit has considered a related claim of federal employee immunity and concluded that the term "individual" includes federal employees prosecuted in their individual capacities. US. v. Dee, 912 F.2d 741,

744 (4th Cir. 1990) (federal employees acting in scope of employment and immune from prosecution under Resource Conservation and Recovery Act, 42 U.S.C. §§6901 et seq.).

[1] Individual government employees are not ordinarily immune from prosecution for their criminal acts. O'Shea v. Littleton, 414 U.S. 488, 503 (1974); cf. Butz v. Economou, 438 U.S. 478, 506 (1978) ("all individuals, whatever their position in government are subject to federal law.").

[2] Nothing in the CWA indicates that Congress intended to depart from this principle. Section 313(a) of the CWA, which governs federal facilities pollution control, provides that

> *Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government ... and each officer, agent, or employee thereof in the performance of his*

official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. 33 U.S.C./ § 1323(a).

[3] Furthermore, section 313(a), the only section of the Act to mention federal employees, specifically excludes federal employees acting within the scope of their employment from civil liability but makes no mention of criminal liability. It provides in relevant part:

. . . No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for

which he is not otherwise liable ....Id.

(Emphasis added).

The in para materia reading urged by Curtis is inappropriate where, as here, the statute is clear and unambiguous. If we were to go beyond the statutory language, we might as easily infer a negative pregnant from the federal employee civil exemption for criminal liability, as from the explicit inclusion of federal employees in other statutes. In any event, Curtis has not made a showing that Congress intended the CWA to be part of a statutory scheme. See 2B Norman J. Singer, Sutherland Statutory Construction § 51.03 at 118 (5th ed. 1992) ("[I]n the absence of some evidence that the legislators were cognizant of the other statutes the presumption [that the legislature was aware of prior legislation] should be rejected and the act not so construed in para materia unless all other means of determining the intent of the legislature have been exhausted.") Accordingly, we find no reason to depart

from the plain meaning of the statute.

[4] In accord with the statutes' plain meaning, individual federal employees acting within the course and scope of their employment are subject to criminal prosecution for violation of the Clean Water Act.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 92-30235

CT/AG#: CR-91-75-JTS

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

JOHN H. CURTIS,

Defendant - Appellant

APPEAL FROM the United States District Court for the District of Alaska (Anchorage).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Alaska (Anchorage) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered: 03/08/93

cc: Dugas

Bryson

Filkin

Judge Singleton